

06-759

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**MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT  
SENTENCE BY A PERSON IN FEDERAL CUSTODY**

<b>United States District Court</b>		<b>District</b> Delaware
Name (under which you were convicted): <u>David Donaldson</u>		Docket or Case No.: <u>05-83</u>
Place of Confinement: <u>FPC Schuylkill</u>		Prisoner No.: <u>05009-015</u>
UNITED STATES OF AMERICA		Movant (include name under which you were convicted)
v. <u>DAVID DONALDSON</u>		

**MOTION**

- (a) Name and location of court that entered the judgment of conviction you are challenging: U.S. District Court for Delaware  
Wilmington, DE
- (b) Criminal docket or case number (if you know): 05-83 (SLR)
- (a) Date of the judgment of conviction (if you know): November 22, 2005
- (b) Date of sentencing: February 22, 2006
- Length of sentence: 30 Months
- Nature of crime (all counts): Access device fraud, 18 U.S. Code § 1029(a)(5)
- (a) What was your plea? (Check one)  
(1) Not guilty ☐ (2) Guilty ☒ (3) Nolo contendere (no contest) ☐  
(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to? N/A
- If you went to trial, what kind of trial did you have? (Check one) Jury ☐ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☒

8. Did you appeal from the judgment of conviction? Yes ☒ No ☐

9. If you did appeal, answer the following:

(a) Name of court: U.S. Court of Appeals for the Third Circuit

(b) Docket or case number (if you know): 06-2719

(c) Result: Motion for Voluntary Dismissal granted

(d) Date of result (if you know): 11/ /06

(e) Citation to the case (if you know): \_\_\_\_\_

(f) Grounds raised: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

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\_\_\_\_\_

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☒

If "Yes," answer the following:

(1) Docket or case number (if you know): \_\_\_\_\_

(2) Result: \_\_\_\_\_

(3) Date of result (if you know): \_\_\_\_\_

(4) Citation to the case (if you know): \_\_\_\_\_

(5) Grounds raised: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

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\_\_\_\_\_

\_\_\_\_\_

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?

Yes ☐ No ☒

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: \_\_\_\_\_

(2) Docket or case number (if you know): \_\_\_\_\_

(3) Date of filing (if you know): \_\_\_\_\_

(4) Nature of the proceeding: \_\_\_\_\_

(5) Grounds raised: \_\_\_\_\_

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\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☐

(7) Result: \_\_\_\_\_

(8) Date of result (if you know): \_\_\_\_\_

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: \_\_\_\_\_

(2) Docket or case number (if you know): \_\_\_\_\_

(3) Date of filing (if you know): \_\_\_\_\_

(4) Nature of the proceeding: \_\_\_\_\_

(5) Grounds raised: \_\_\_\_\_

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\_\_\_\_\_

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☐

(7) Result: \_\_\_\_\_

(8) Date of result (if you know): \_\_\_\_\_

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):  
See reverse side of this page.

Appeal withdrawn on Petitioner's motion as this claim had to be presented in this petition and not on direct appeal.

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

At Petitioner's sentencing on 2/22/06, Petitioner's attorney failed to present available evidence in mitigation of sentence to support an argument that Petitioner should receive a lesser sentence in consideration of the factors set forth in 18 U.S. Code §3553(a), including the substantial disparity from the probationary sentence that the court imposed upon Petitioner's codefendant Gary Arters, that there should also be a variance based upon the Petitioner's early acceptance of responsibility, such as his statement to the authorities admitting his involvement as well as the testimony of Petitioner's character witnesses (attached are affidavits executed by Melissa Heck and Robert Fontanez). Counsel should have objected to the court's failure to comply with the requisite sentencing methodology as set forth in United States v. Booker, 543 U.S. 220 (2005) and United States v. Cooper, 437 F. 3d 324 (3<sup>rd</sup> Cir. 2005), which was brought to the court's attention by the Government although without objection from defense counsel. Therefore, this case requires a new sentencing where all of the §3553(a) factors may be appropriately considered, not just the applicable sentencing guidelines range.

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: \_\_\_\_\_

GROUND TWO: \_\_\_\_\_

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

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(b) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: \_\_\_\_\_

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(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

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(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

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(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: \_\_\_\_\_

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**GROUND THREE:** \_\_\_\_\_

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

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(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: \_\_\_\_\_

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(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

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Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_



Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: \_\_\_\_\_

**GROUND FOUR:** \_\_\_\_\_

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

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(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: \_\_\_\_\_

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(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

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Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

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(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

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Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

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(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: \_\_\_\_\_

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: \_\_\_\_\_

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes ☐ No ☐

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. \_\_\_\_\_

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: \_\_\_\_\_

(b) At arraignment and plea: \_\_\_\_\_

(c) At trial: \_\_\_\_\_

(d) At sentencing: \_\_\_\_\_

(e) On appeal: \_\_\_\_\_  
\_\_\_\_\_

(f) In any post-conviction proceeding: \_\_\_\_\_  
\_\_\_\_\_

(g) On appeal from any ruling against you in a post-conviction proceeding: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☐

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☐

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: \_\_\_\_\_  
\_\_\_\_\_

(b) Give the date the other sentence was imposed: \_\_\_\_\_

(c) Give the length of the other sentence: \_\_\_\_\_

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.\* Petition is timely.

\* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

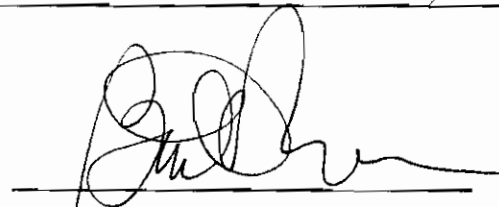
A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief: \_\_\_\_\_

\_\_\_\_\_ a new sentencing hearing \_\_\_\_\_

or any other relief to which movant may be entitled.



Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on \_\_\_\_\_ (month, date, year).

Executed (signed) on 12/1/06 (date).



Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

IN FORMA PAUPERIS DECLARATION

\_\_\_\_\_  
[Insert appropriate court]

\* \* \* \* \*

IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF DELAWARE

UNITED STATES OF AMERICA	:	
	:	
vs.	:	Docket No: 05-83 (SLR)
	:	
DAVID DONALDSON	:	

**AFFIDAVIT OF MELISSA HECK**

COMES NOW, Melissa Heck, of the County of New Castle, Delaware being  
duly sworn according to law, and hereby deposes and avers that the following  
information is true and correct to the best of my knowledge, information and  
belief:

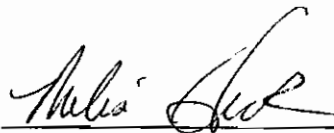
1. I was present at the sentencing of David Donaldson on Wednesday,  
February 22, 2006 at the United States Courthouse in Wilmington, Delaware  
before the Honorable Sue L. Robinson, Chief Judge. Counsel for Mr. Donaldson,  
Anthony A. Figliola, Jr., Esquire, was present but did not speak with me about my  
being a witness in court for Mr. Donaldson, with whom I lived at the time and who  
is the father of my two children. I was not called as a witness although I was  
willing and prepared to testify to Mr. Donaldson's good character. At no time prior  
to that sentencing did Mr. Figliola prepare me to testify, interview me for this  
purpose, or even approach me to solicit me to testify on David's behalf.

2. Had counsel for the Defendant interviewed me, I would have informed  
him, as I was prepared to testify before the Court, that David Donaldson was an

excellent father to my two children, J (then age 4) and T (then age 6 months). I was also prepared to testify as to the kind of father the Defendant was to his daughter B. (then age 13). I wanted the court to know that the Defendant's absence from his family situation would cause a devastating negative effect upon myself and all three of his children, which has in fact occurred. Although I wanted to inform the court of this information, Mr. Figliola did not provide me with the opportunity to so testify.

3. If there is another hearing before the court, I am prepared to testify to the above.

Respectfully submitted,



MELISSA HECK

Bear, Delaware

Date of Birth: , 1978

DATED: 11/7/06

GERALDINE E. HUSS  
NOTARY PUBLIC OF DELAWARE  
My Commission Expires June 30, 2007





IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF DELAWARE

UNITED STATES OF AMERICA	:	
	:	
vs.	:	Docket No: 05-83 (SLR)
	:	
DAVID DONALDSON	:	

AFFIDAVIT OF ROBERT FONTANEZ

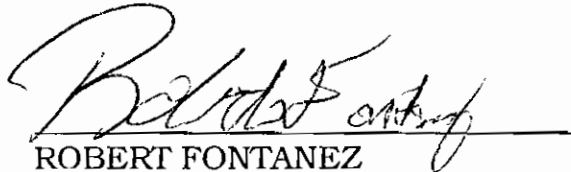
COMES NOW, Robert Fontanez, \_\_\_\_\_, Wilmington,  
Delaware \_\_\_\_\_ being duly sworn according to law, hereby deposes and avers  
that the following information is true and correct to the best of my knowledge,  
information and belief:

1. I was present at the sentencing in the above matter on February 22,  
2006 but I was not asked to testify on the Defendant's behalf. His attorney did  
not interview me as a potential character witness.

2. I have known David Donaldson since I was ten (10) years old. I would  
have informed the court, had I been given the opportunity to so testify, that David  
was more of a father to me than my own father and stepfather. David allowed me  
to be employed in his business and took me under his wing. Even though I may  
have made some mistakes that were costly to his business, he never fired me from  
the job. I have seen David Donaldson's interaction with his children and I can  
attest that he has been and I believe will always be completely dedicated to the  
welfare and betterment of his three children. His character has always been  
excellent in my eyes.

3. If there is another hearing before the court, I am prepared to testify to the above.

Respectfully submitted,

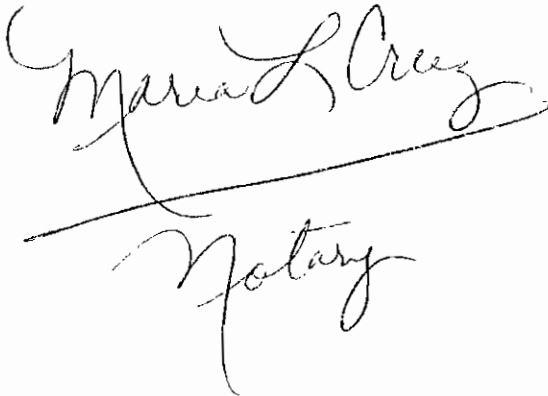
  
ROBERT FONTANEZ

Wilmington, Delaware

Date of Birth: , 1979

DATED: 11/15/06

*Signed and subscribed on  
the 15th day of November, 2006.*

  
Notary

MARIA L. CRUZ  
NOTARY PUBLIC  
STATE OF DELAWARE  
My Commission Expires Dec. 15, 2007

BURTON A. ROSE, ESQUIRE  
Attorney-at-Law  
1731 Spring Garden Street  
Philadelphia, PA 19130-3893

# **FIRST CLASS MAIL**

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